est on an unliquidated debt. If the date is settled, and the liability to pay something is undisputed, the only question being the amount due, interest has been allowed from the date the principal fell due.[14] In New York this is the settled rule; in Florida the distinction between liquidated and non-liquidated debts is practically obliterated, and this rule is followed in Missouri, Texas, Wyoming, Illinois, Wisconsin, Georgia, Connecticut and Minnesota.[15] The word liquidated could not possibly be extended to cover this situation, so some other ground must be found. The holding is probably based on the rule that interest may be had on demands not liquidated or capable of being liquidated except by agreement of the parties or adjudication where the debtor is in default because of vexatious delay in not taking the steps necessary to ascertainment.[16]

Instead of clinging to an outworn rule and torturing the definition of the word liquidated beyond recognition, it would be better to look into the basis of all of the awards of interest. From the decisions it is clearly shown that interest is allowed from the time the creditor was entitled to the principal when, and only when, the debtor can be shown to be in default in not paying the money.

H. V. D.

SALES OF PERSONAL PROPERTY: THE DOCTRINE OF POTENTIAL EXISTENCE.—In the case of *State Bank of Ramona v. Clelland*[1] the court said by way of dictum, "that personal property having a potential existence may be mortgaged." Among the property described in the mortgage was the following: "All my bees, bee material, implements, hives and produce of bees." Why was it necessary in order for this mortgage to be valid to resort to the archaic doctrine of potential existence?

The doctrine of potential existence is a common law fiction. There is no doubt of the possibility both at common law and under our law today of contracting to sell goods which the seller does not own at the time.[2] But it is obvious in the nature of the case that it is impossible for a seller to transfer presently title to goods to which he has no ownership at the time of the sale. As he has no title he can give none.[3] The common law

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[14] Mix v. Miller (1881), 57 Cal. 356.

[15] Sutherland on Damages, §347.

[16] McCowen v. Pew (1912), 18 Cal. App. 482, 123 Pac. 354; Estate of Sanderson (1887), 74 Cal. 199, 215, 15 Pac. 753; McMahon v. N. Y. & Erie R. R. (1859), 20 N. Y. 463, 468; Scroggs v. Cunningham (1876), 81 Ill. 110.

[1] (Sept. 3, 1918), 27 Cal. App. Dec. 296.

[2] Williston on Sales, §128, n. 3.

[3] Emerson v. European R. R. Co. (1877), 67 Me. 357, 24 Am. Rep. 39; Skipper v. Stokes (1868), 42 Ala. 25, 57, 94 Am. Dec. 646.

made an exception to this rule in the case of crops and the young of animals, which the seller, as the owner of the root and stem, was afterwards to acquire, and gave it a wider effect than a contract to sell. The doctrine was laid down in the leading case of Grantham v Hawley[4] that the crops of specified land, the wool to be clipped in the future from specified sheep, or the future young of specified animals, can be bargained and sold at law, because the seller has potential possession. Though the doctrine seems to have been rarely invoked no limitation of it has ever been suggested in England by courts. In 1846, it was applied against an attaching creditor of crops who was deprived of the property attached because it had been mortgaged by the occupant of the land before it came into existence.[5] The effect of this doctrine, obviously based on a fiction, is not only that the legal title to the future property passes to the buyer as soon as the property comes into existence, but that this title is regarded as relating back to the time of the agreement. Since these decisions the doctrine, so far as discovered, has not been referred to in the English Reports, and the Sale of Goods Act apparently discards it in providing that, "Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods."[6] Therefore, since the passage of the Act it may be assumed that the doctrine of potential existence is abolished in England.

The American Sales Act adopted by the committee in 1906 to make uniform the law of sales, makes no exception to the general rule as to future goods in favor of goods of which the seller has potential possession.[7] The Sales Act, therefore, apparently abolishes the doctrine of potential possession from the law of sales, which, however, has no application to mortgages. The Sales Act has already been enacted in seventeen states,[8] but California is not one of them. The California Civil Code[9] provides that any property which if in existence might be the subject of sale, may be subject for agreement of sale, whether in existence or not. The courts have interpreted this to allow the sale of future goods in which the vendor at the time of the agreement has a potential ownership.[10] The sale becomes complete

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[4] (1616), Hob. 132.

[5] Petch v. Tutin, 15 M. & W. 110.

[6] Sale of Goods Act, §5 (3).

[7] Sales Act, § 5 (3).

[8] Arizona, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Utah, Wisconsin, Wyoming.

[9] § 1730.

[10] Cutting Packing Co. v. Packers (1890), 86 Cal. 574, 25 Pac. 52, 21 Am. Rep. 63; Shoemaker v. Acker (1897), 116 Cal. 239, 48 Pac. 62; Blackwood v. Cutting Co. (1888), 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Brower v. Anderson (1888), 77 Cal. 236, 19 Pac. 487; Central Oil Co. v. Saulhenn Ref. Co. (1908), 154 Cal. 165, 97 Pac. 177, 81 Am. St. Rep. 42-46.

when the product or increase comes into existence, and title passes to the vendee as a present vested right.

In all cases the thing sold must be founded on a thing *in esse*. A mere possibility or expectancy not coupled with an interest in or growing out of the property cannot be made the subject of a valid sale or transfer.[11] For instance one has no potential property in a catch of fish he expects to make even though he has a ship and nets and all other appliances necessary for catching fish. He has no property actual or potential until they are caught, and cannot pass any property right in them until that time.[12]

Should the Sales Act be adopted in California these agreements for the sale of future goods, whether they have potential existence or not, could not amount to anything more than agreements to sell. The abolition of the doctrine is wise. If the ordinary doctrines applicable to real and personal property do not afford as much protection as is desirable to transactions relating to crops or animals the extent of the right of the seller should be exactly defined and more closely limited than is done under the doctrine of potential possession. There is no reason that such transactions should give peculiar protection to the possible prejudice of innocent creditors or purchasers.[13]

If the doctrine be abolished by the Sales Act, is it necessary in order that a chattel mortgage of after-acquired property be valid that we resort to the doctrine of potential existence? At common law, it is doubtless true, that a party could not mortgage property not then *in esse*, so as to vest title in the mortgagee when the property came into existence.[14] But at civil law he could.[15] In California a mortgage may be given on real property to be acquired by the mortgagor after the execution of the mortgage.[16] A chattel mortgage of property not in the possession of the mortgagor at the time of making the mortgage is valid. As to the effect of the mortgage of future goods, it is clearly established that the mere agreement to mortgage personal property subsequently to be acquired gave the mortgagee a lien upon the property as soon as it was acquired, good as between the parties,[17] even though the formalities prescribed in Section 2957 of the Civil Code have not been observed.[18] Whether a chattel mortgage upon a crop to be planted is valid is a ques-

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[11] Wheeler v. Wheeler (1859), 2 Met. 474, 74 Am. Dec. 421.

[12] Low v. Pew (1871), 108 Mass. 347, 11 Am. Rep. 357; Modern American Law, Vol. 4, p. 294.

[13] 19 Harvard Law Review, 559.

[14] Sharfenburg v. Bishop (1872), 35 Iowa 66.

[15] Domat, on the Civil Law, Part I, Book III, Title 1, §1; 76 Am. Dec. 723, n.

[16] California Title Co. v. Pauly (1896), 111 Cal. 222, 46 Pac. 586.

[17] Works v. Merritt (1895), 105 Cal. 467, 38 Pac. 1109.

[18] Lemon v. Wolff (1898), 121 Cal. 274, 53 Pac. 801; Calif. Title Co. v. Pauly, supra, n. 16.

tion upon which the decisions are in conflict in the various states. Whatever may be the law in other states, the right to make a chattel mortgage upon crops before the same have been planted, has become an established rule of property in this state,[19] and the mortgagee's lien attaches as soon as the property is acquired. It is only necessary that such after-acquired property shall be capable of identification in order to give the mortgagee a valid lien.[20] Since a lien is recognized on these after-acquired goods, thereby making these chattel mortgages valid[21] without any new act on the part of the mortgagee, what particular advantage can there be in the artificial doctrine of potential existence?

T. A. M.

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[19] Pingree Chattel Mortgages, § 217 et seq.

[20] Arques v. Wassan (1877), 51 Cal. 620, 21 Am. Rep. 718; Hall v. Glass (1899), 123 Cal. 500, 56 Pac. 336, 69 Am. St. Rep. 77; Wilkerson v. Thorp (1900), 128 Cal. 221, 60 Pac. 679; Lemon v. Wolff, supra, n. 18.

[21] Muir v. Blake (1882), 57 Iowa 662, 11 N. W. 621; supra, n. 20.